89-303

No. _____.

In The

Supreme Court of the United States

October Term, 1989

THE STATE OF TEXAS,

Petitioner,

v.

KENNETH JOSEPH SMITH,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIRST SUPREME JUDICIAL DISTRICT OF TEXAS AT HOUSTON, TEXAS

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QUESTIONS PRESENTED FOR REVIEW

I.

DOES *EDWARDS V. ARIZONA* PROHIBIT ALL INTERROGATION OF A SUSPECT WHO SAYS HE WILL ANSWER SOME QUESTIONS WITHOUT COUNSEL IF HE ALSO SAYS HE WOULD LIKE TO CONTACT AN ATTORNEY?

II.

DID THE POLICE COMPLY WITH *EDWARDS* BY MAKING COUNSEL AVAILABLE WHEN THE RESPONDENT WAS OFFERED THE USE OF A TELEPHONE AND TELEPHONE DIRECTORY?

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Petitioner respectfully requests that a writ of certiorari issue to the Court of Appeals for the First Supreme Judicial District of Texas, at Houston, Texas, in order for this Court to review the decision in this cause by a panel of that Court of Appeals, which reversed the Respondent's conviction for Driving While Intoxicated.[1]

[1] The State of Texas, as Petitioner, and Kenneth Joseph Smith, as Respondent, are the only parties to this cause.

DECISION BELOW

The decision of the Court of Appeals for the First Supreme Judicial District of Texas (hereinafter the "Court of Appeals") is published at 754 S.W.2d 310. A copy of the opinion is reproduced in Appendix A. Rehearing was denied summarily, and the Court of Criminal Appeals refused discretionary review and denied rehearing of the petition for discretionary review by summary orders. These orders are reproduced in Appendix B.

JURISDICTION OF THE COURT

Under 28 U.S.C. § 1257, this Court has jurisdiction to review "final judgments or decrees rendered by the highest Court of a State in which a decision could be had . . . by writ of certiorari . . . where any title, right, privilege or immunity is specially set up or claimed under the constitution, treaties or statutes of . . . the United States." In this cause the Respondent was charged by information with the misdemeanor offense of Driving While Intoxicated, and a jury found the Respondent guilty as charged. In the course of the trial the Respondent sought to suppress certain evidence, specifically the audio portion of a videotape, but the trial court held that this evidence was admissible (R. II-11-12).[2] On appeal to

[2] The record is designated herein as follows: R. I is the transcript containing court documents, and R. II is a statement of facts from the suppression hearing and jury trial prepared by the court reporter.

the Court of Appeals for the First Supreme Judicial District of Texas, sitting at Houston, the Respondent contended that the trial court's ruling on the suppression motion was erroneous. The Court of Appeals agreed and reversed the conviction. *Smith v. State*, 754 S.W.2d 310 (Tex. App. – Houston [1st Dist.] 1988, pet. ref'd).

The Petitioner filed a motion for rehearing en banc in the Court of Appeals, which was denied without a written opinion on July 28, 1988.[3] The Petitioner then petitioned the Court of Criminal Appeals of Texas for discretionary review, pursuant to TEX. R. APP. P. 200. The Court of Criminal Appeals refused discretionary review on May 10, 1989. The Petitioner then filed a motion for rehearing pursuant to TEX. R. APP. P. 202(1), but the Court of Criminal Appeals denied the motion for rehearing without a written opinion on June 28, 1989. Accordingly, the decision of the Court of Appeals became "final" for this Court's jurisdictional purposes on June 28, 1989.[4] There is no higher court in Texas in which a decision may be had.

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[3] Why a motion for rehearing en banc? The original three-judge panel included a visiting retired judge, and one of the two regular judges of the Court of Appeals wrote the opinion. The Petitioner's only realistic chance in the Court of Appeals was to find allies among the other seven judges of the court. In any event, a motion for rehearing is not a requirement for further proceedings in Texas criminal appellate practice. Tex.R.App.P. 200(d).

[4] The mandate of the Court of Appeals has issued, but the Petitioner will file a motion in the Court of Appeals to recall the mandate.

Whether the Court of Appeals' decision rested on a federal constitutional claim or "independent" Texas law is determined under the guidelines set forth in *Michigan v. Long*, 463 U.S. 1032 (1983) and its progeny. The two issues presented here concern the Court of Appeals' conclusion that evidence was admitted in violation of the rule of *Edwards v. Arizona*, 451 U.S. 477 (1981), which was a "prophylactic rule" based on U.S. CONST. amend. V. *Oregon v. Bradshaw*, 462 U.S. 1039, 1044 (1983). The Court of Appeals' opinion did not cite the corresponding Texas constitutional provision.[5] The Court of Appeals' decision did cite a Texas case on this issue, namely *Ochoa v. State*, 573 S.W.2d 796 (Tex. Crim. App. 1978), but the issue in *Ochoa, supra* at 798 stated that the issue was compliance

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[5] Examination of the Respondent's suppression motion (R. I-23) and argument in the trial court (R. II-6-12) shows that the Respondent was relying on federal constitutional law, particularly *Edwards, supra*, not independent Texas law. The only Texas case discussed was one mentioned by the judge, *McCambridge v. State*, 712 S.W.2d 499 (Tex. Crim. App. 1986), which, as the trial judge observed, dealt only with the federal constitutional issue. See footnote 2 in *McCambridge, supra* at 500. The Respondent's brief in the Court of Appeals cited *Edwards, Miranda,* and *Smith v. Illinois*, 469 U.S. 91 (1985). The Respondent's brief also cited several Texas cases, but those cases also addressed the Fifth Amendment and *Edwards* rather than independent Texas law. For example, the Respondent's brief excerpted a portion of *Jones v. State*, 742 S.W.2d 398, 404 (Tex. Crim. App. 1987) which indicated the issue in *Jones* was waiver of "*Miranda* protections." The issue again was characterized as "one grounded in the Fifth Amendment guarantees of *Miranda* and *Edwards*" in *Knox v. State*, 769 S.W.2d 244, 246 (Tex. Crim. App. 1989). The Respondent also cited a few cases from other states, which obviously were not construing Texas law.

with "the requirements of *Miranda v. Arizona*, 384 U.S. 436 . . . (1966)," and the decision was based entirely on an analysis of Fifth Amendment principles, particularly the requirements of *Miranda*.[6] *Michigan v. Long* makes it clear that when an issue of the admissibility of evidence produces a decision which "fairly appears to rest primarily on federal law," then this Court has jurisdiction to review the decision. 463 U.S., at 1040-1042. Recently *Harris v. Reed*, ___ U.S. ___, 109 S.Ct. 1038, 1042 (1989) reiterated the "plain statement" standard of *Long*:

> Under *Long*, if "it fairly appears that the state court rested its decision primarily on federal law, this Court may reach the federal question on review unless the state court's opinion contains a "'plain statement' that [its] decision rests upon adequate and independent state grounds." [*Long*, 463 U.S.,] at 1042, 103 S.Ct., at 3477.

Here there certainly was no "plain statement" of reliance on independent Texas law grounds.

CONSTITUTIONAL PROVISIONS AT ISSUE

The constitutional provision which is central to this cause is a portion of U.S. CONST. amend. V, which states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except

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[6] The mere citation of a Texas case would not be enough to show that the Court of Appeals was clearly and expressly basing its decision on "separate, adequate, and independent" state constitutional grounds. *Florida v. Riley*, ___ U.S. ___, 109 S.Ct. 693, 695, fn. 1 (1989).

> in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; *nor shall be compelled in any criminal case to be a witness against himself,* nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation (emphasis added).

Under *Benton v. Maryland*, 395 U.S. 784 (1969), the Fifth Amendment's self-incrimination clause, underscored above, is made applicable in this state criminal trial through U.S. CONST. amend. XIV, § 1, which states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law;* nor deny to any person within its jurisdiction the equal protection of the laws (emphasis added).

STATEMENT OF THE CASE

A misdemeanor information filed in Harris County Criminal Court at Law Number 8 accused the Respondent of Driving While Intoxicated, in violation of TEX. REV. CIV. STAT. ANN. art. 6701l-1 (Vernon 1984). The Respondent filed a motion to suppress evidence, specifically the audio portion of a videotape made during an interview at the Houston Police station following the Respondent's

arrest.[7] The motion alleged that the Respondent's answers to questions during this interview were obtained in violation of the Fifth Amendment, as construed in *Edwards v. Arizona*. The trial court considered the admissibility of the audio portion of the tape outside the presence of the jury and concluded that it was admissible. The tape was admitted into evidence, and it is included in the appellate record. For this Court's convenience, a partial transcription of the tape is included herein as Appendix C. There was more to the tape, however, and it is important that this Court examine the tape itself.[8]

The videotape showed that the Respondent was given *Miranda* warnings, and the officer conducting the interview attempted to determine whether the Respondent was willing to answer some questions. In the course of that discussion excerpted by the Court of Appeals, the Respondent indicated he wanted to contact an attorney:

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[7] By statute, all counties in Texas having populations in excess of 25,000 are required to provide facilities for videotaping suspects arrested for Driving While Intoxicated. Act of June 16, 1983, ch. 303, § 24, 1983 TEX. SESS. LAW SERV. 1568 (Vernon). That requirement applies in Harris County, which includes the City of Houston. The failure of the police to videotape a suspect is evidence which a defendant may introduce in order to raise reasonable doubt of guilt. *Drewett v. State*, 704 S.W.2d 43 (Tex. Crim. App. 1986).

[8] This transcription was not admitted at trial. It was prepared by the Respondent's counsel and appended to the Respondent's brief in the Court of Appeals. Although material attached to briefs cannot be considered evidence per se, both parties in this cause have treated the transcription as a substantially correct recitation of dialogue on the tape. This Court also should examine the tape itself.

> POLICE OFFICER: Now sir, at this time, I'd like to ask you a few questions. Keeping your legal warning in mind, you do not have to answer these questions if you do not wish to do so. Would you like to answer a few questions for me sir?
>
> RESPONDENT: I can't say yes sir.
>
> POLICE OFFICER: Yes sir, you can answer them if you'd like.
>
> RESPONDENT: I can answer you sir, but I can't say yes to all the questions without my lawyer, sir.
>
> POLICE OFFICER: I see, would you like a lawyer? *Would you like to call your lawyer?*
>
> RESPONDENT: *Yes sir* (emphasis in Court of Appeals' opinion).

As indicated by the emphasis in the excerpt, the Court of Appeals panel regarded the last question and answer as decisive, holding that all interrogation should have ceased at that point.

Interrogation, as that term is defined in this Court's case law such as *Rhode Island v. Innis*, 446 U.S. 291 (1980), did stop temporarily at that point. The officer directed the Respondent to a telephone and a telephone directory and suggested that he call an attorney. The Respondent declined to do that. Instead he said he wanted to call a "friend" who had an attorney. When the officer said the Respondent would only be allowed to call an attorney, not a friend, the Respondent declined to use the telephone directory. The officer then asked if the Respondent wanted to answer any questions, and the Respondent said he would answer some questions but not others. The

interview then proceeded, with the Respondent answering some questions but declining to answer others without consulting an attorney.

The Court of Appeals held that all questioning after the first request for counsel was improper under *Edwards v. Arizona*. The Court of Appeals concluded that the audio portion of the tape should have been suppressed, and further held that its admission was harmful.

REASONS FOR GRANTING THE WRIT

This cause presents two questions calling for review by this Court:

> 1. Does *Edwards v. Arizona* prohibit all interrogation of a suspect who says he will answer some questions without counsel if he also says he would like to contact an attorney?
>
> 2. Did the police comply with *Edwards* by making counsel available when the Respondent was offered the use of a telephone and telephone directory?

Each of these questions is addressed in turn below. If the answer to the first question is no, the Court of Appeals was in error and there is no need to reach the second question. Similarly, if the answer to the second question is yes, the Court of Appeals was in error and there is no need to decide the first question.

I.

THE COURT OF APPEALS ERRONEOUSLY HELD THAT *EDWARDS V. ARIZONA* PROHIBITS ALL INTERROGATION OF A SUSPECT WHO SAYS HE WILL ANSWER SOME QUESTIONS WITHOUT COUNSEL IF HE ALSO SAYS HE WOULD LIKE TO CONTACT AN ATTORNEY.

The Fifth Amendment protects a criminal defendant against compelled self-incrimination. *Miranda* recognized that the privilege against self-incrimination included a right to remain silent in the face of police interrogation prior to trial. As an adjunct to that right, *Miranda* recognized that a suspect also has the right to consult with an attorney before answering any questions and the right to have counsel present during any interrogation. *Miranda* also recognized, however, that the right to remain silent and the right to counsel could be waived.

In 1981 *Edwards* redefined the "waiver" side of the equation, placing emphasis on whether a suspect who had requested an attorney "initiated" further discussions. Despite the emphasis on initiation in *Edwards*, the actual "rule" was set forth in this manner:

> . . . we now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to

> him, unless the accused himself initiates further communication, exchanges, or conversations with the police. 451 U.S., at 484-485.

That the second sentence above states the "rule" of *Edwards* cannot be doubted after this Court so stated in *Arizona v. Mauro*, 481 U.S. 520, 107 S.Ct. 1931, 1934 (1987). Obviously there is more to this than just the question of "initiation." What actually was decided in *Edwards* was the proposition specifically set forth in the second sentence, as this Court's responsibility in *Edwards* was to decide the issue presented on the facts of that case rather than to issue a universal proclamation. Edwards had expressed a desire to "deal with the police only through counsel." The key word is "only." *Edwards* did not call on this Court to decide what, if any, "bright line" rule applied in a situation where a suspect indicated a willingness to respond selectively to interrogation. That is what the Respondent did here.

The Court of Appeals treated the one question and answer underscored in its opinion as an unequivocal indication that the Respondent wanted to deal with the police only through counsel, i.e., as to all questioning, but that view is untenable in light of the Respondent's immediately preceding statement: "I can answer you sir, but I can't say yes to all the questions without my lawyer, sir." The most logical interpretation of the statement that the Respondent could not answer "all the questions" is that the Respondent was willing to answer *some* questions without conferring with counsel. There is no inconsistency between a suspect's willingness to answer selected questions and an affirmative response to a policeman's question seeking to determine if the suspect wants to

contact counsel at that time. The question and answer should have been construed as they apparently were intended, which was as an offer and an acceptance of prompt access to an attorney in order to facilitate the Respondent's stated intent of answering questions selectively. Instead the Court of Appeals read into the Respondent's "Yes sir" answer an additional assertion that the Respondent was reversing the position he stated only seconds before. Realistically, that was not even implied, let alone "unequivocally" asserted.

This Court never has confronted the precise issue presented here, in which a suspect indicates he wants counsel before answering certain questions but will answer other questions without conferring with counsel. The issue has arisen in a few lower federal court decisions. The Fifth Circuit addressed a similar situation in *United States v. Jardina*, 747 F.2d 945 (5th Cir. 1984), *cert. denied* 470 U.S. 1058 (1985). While that case hinged on the fact that Jardina's references to counsel were not clear requests to consult counsel at that time, the opinion did note a selective willingness to answer questions. The Eleventh Circuit confronted this issue in *United States v. Eirin*, 778 F.2d 722 (11th Cir. 1985), where codefendant Botero said he would answer questions about his own activities but would not discuss his brother without consulting with an attorney. *Eirin* held that this did not prohibit further questioning pertaining to Botero himself, 778 F.2d, at 728, though in *Eirin*, as in *Jardina*, the issue was complicated by a request for counsel as to other matters. Most recently, *Bruni v. Lewis*, 847 F.2d 561 (9th Cir. 1988), *cert. denied* ___ U.S. ___, 109 S.Ct. 1319 (1989),

considered a post conviction attack on an Arizona conviction wherein Bruni claimed that he was interrogated twice in violation of *Edwards*. In response to an officer's request that he answer questions, Bruni first said, "Not without my attorney," but then added "Well, ask your questions and I will answer those I see fit." The Ninth Circuit held that Bruni made a "selective waiver." Subsequently Bruni told another detective that he would answer questions selectively, particularly "those he felt good to answer or that he thought his attorney would probably advise him to answer." 847 F.2d at 564. The Ninth Circuit found no *Edwards* violation arising from either exchange. Certainly all these cases can be distinguished, but they also support the view that a conversation about a suspect's access to counsel must be considered as a whole to determine the extent to which the suspect is invoking that right.

As the Petitioner has pointed out since its original brief, the closest precedent in this Court's case law appears to be *Connecticut v. Barrett*, 479 U.S. 523 (1986), wherein Barrett said he was willing to give an oral statement without counsel but not willing to give a written statement without counsel. The majority opinion in *Barrett*, in which six members of this Court joined, held that Barrett's oral confession was admissible, in view of the police respect for Barrett's limited request for counsel and Barrett's "affirmative announcements of his willingness to speak." 107 S.Ct., at 832. The Court of Appeals responded by discussing Justice Brennan's concurring opinion in *Barrett*, not the majority opinion! The Petitioner knows of no other occasion on which a majority opinion has been filtered through the concurring view of

one justice in order to determine its meaning and applicability. It is particularly strange that the Court of Appeals would do so when the concurring opinion in *Barrett* forthrightly stated that Justice Brennan concurred in the judgment "for reasons different from those set forth in the opinion of the Court." 107 S.Ct., at 833.

The Court of Appeals' reasoning hinged on its statement that "the burden was on the State to show that appellant specifically and affirmatively waived his right to counsel, or that appellant initiated further discussions with the police," citing footnote 6 of *Edwards*. The Court of Appeals essentially ignored the Petitioner's argument that the "only through counsel" premise of *Edwards* was not met. With all due respect to the Court of Appeals, a cogent application of *Barrett* would have led to the conclusion that the Respondent did waive his right to counsel selectively. The exercise of such selectivity itself strongly suggests that the Respondent was dealing with the police in a calculated and voluntary manner, negating the "inherently coercive atmosphere" which is the raison d'etre for *Miranda* and *Edwards*.[9]

The Respondent cited *Smith v. Illinois, supra* in his brief filed in the Court of Appeals, but the Court of

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[9] In the long run the Court of Appeals' decision is apt to be counterproductive to protection of Fifth Amendment interests. The Court of Appeals' decision is likely to discourage officers from attempting to clarify a suspect's wishes or offering access to counsel before a suspect unequivocally demands it. The lesson seems to be that an officer should minimize any discussion about *Miranda* rights which might provide a reviewing court with the chance to find an invocation of some right.

Appeals' opinion did not address that case. The Petitioner urges this Court to overrule *Smith v. Illinois* when the right occasion presents itself, and this cause would be one possible vehicle for doing so.[10] The Petitioner preserved this argument throughout the appellate process, arguing to both courts below that this Court ought to overrule *Smith v. Illinois* in the hope that a lower court would recommend that step. When *Miranda* placed a burden on the government to demonstrate a waiver of rights, this Court at least implied that the totality of the circumstances should be considered. This Court made that explicit in *Fare v. Michael C.*, 442 U.S. 707, 724-725 (1979). See also *Castillo v. State*, 742 S.W.2d 1, 4 (Tex. Crim. App. 1987). It is difficult to reconcile *Smith v. Illinois* with

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[10] Here subsequent statements by the Respondent indicated that he was sticking with his original position of willingness to answer some questions but not others. There had been an intervening discussion about the particulars of contacting counsel, which was not a discussion which reasonably may be called interrogation under *Innis*. Then the officer asked "[A]re you willing to answer any questions for me?" If the Respondent wanted to deal with the police "only" through counsel, that was the perfect opportunity to so indicate by saying "No." Instead the Respondent answered "Yes," and he followed that up by reiterating his intent to pick and choose among the questions. If *Smith v. Illinois* bars that type of exchange, then it has completely divorced *Edwards* from its justification, which was "to protect an accused in police custody from being badgered by police officers." *Oregon v. Bradshaw*, 462 U.S., at 1044. When this dialogue is considered, it is clear that this is an instance where subsequent answers confirmed, not undermined, the Respondent's original position of answering questions selectively. Does this not suggest that any categorical rule barring consideration of such post-invocation statements is as apt to conceal the true situation as to reveal it?

that approach, since *Smith v. Illinois* erects a Chinese wall between a statement deemed "unequivocal" and anything that follows it. That is a neat formulistic approach, but it defies common sense. If a suspect's intent really was "unequivocal," why would an immediately following statement, prompted by nothing more than an attempt at clarification of *Miranda* rights, give an opposite indication?

The demise of *Smith v. Illinois* is not a necessary step, however, in order for the Petitioner to prevail on this issue. *Smith v. Illinois* forbade consideration of statements made after counsel was requested to "cast retrospective doubt" on the request, but *Smith* also stressed that the Court was not deciding the effect of events preceding a request for counsel. 469 U.S., at 99-100. Here the Respondent's preceding statement indicated a willingness to proceed selectively without the aid of counsel. Drawing on Justice Brennan's concurrence in *Barrett*, the Court of Appeals deemed the partial invocation "ambiguous," in contrast to *Jardina, supra* at 949, which found a similar selective invocation to be "without the slightest ambiguity." Even if the Court of Appeals' characterization of the conversation is correct, however, *Smith v. Illinois* still would be inapposite, as that decision only forbade resort to subsequent statements to undermine a request for counsel which was considered *un*ambiguous.

This cause arose from a misdemeanor trial with a light punishment, but that should not obscure the importance of the issue. Another form of selective request for counsel was presented in a capital murder case, *Griffin v. Lynaugh*, 823 F.2d 856 (5th Cir. 1987), *cert. denied* ___ U.S. ___, 108 S.Ct. 1059 (1988), wherein *Barrett* was cited by the

Fifth Circuit panel majority in upholding the admissibility of a confession. Griffin asked for a particular attorney and was put in contact with that attorney, who declined to help him. When an offer of contact with another attorney was made, Griffin turned it down. Clearly the totality of the discussion between Griffin and the police was considered in resolving the issue. That is what should have been done here, but instead the Court of Appeals minced the conversation in order to find a hook on which to hang a per se rule.

The issue of the meaning of the "only through counsel" aspect of the rule stated in *Edwards* is squarely presented for review here, with no procedural default or "independent state law" impediments to this Court's consideration of the issue. The time is ripe to flesh out this premise in the *Edwards* rule, particularly in light of the divergent conclusions reached in this cause and in *Bruni*. The matter of "initiation" has been widely discussed in post-*Edwards* case law, but to focus on initiation without first considering the "only through counsel" premise of *Edwards* is to put the cart before the horse.

II.

THE POLICE COMPLIED WITH *EDWARDS* BY MAKING COUNSEL AVAILABLE WHEN THE RESPONDENT WAS OFFERED THE USE OF A TELEPHONE AND TELEPHONE DIRECTORY.

The second issue for review is important not only because of the need to develop another aspect of the *Edwards* rule, but because of the need for this Court to

clarify the proper balance between competing interests in the context of post-arrest interrogations in DWI cases. This Court long has recognized the magnitude of the problem of drunk driving and the significant hazard drunk drivers pose to public safety. See *South Dakota v. Neville*, 459 U.S. 553, 558 (1983); *Breithaupt v. Abram*, 352 U.S. 432 (1957). While acknowledging the need to give the police a strong hand in this area of regulation, this Court has not hesitated to weigh carefully claims of infringement on the constitutional rights of DWI suspects. This cause calls upon this Court to answer a question left unanswered in *Edwards* which is of vital importance in DWI investigations: What is adequate to satisfy the alternative under *Edwards* of making counsel "available" to a suspect? This is a question with ramifications for all types of offenses, but it is particularly important in DWI cases for two reasons: (1) time is of the essence in any given case, and a delay in carrying out a defined protocol of post-arrest procedures may result in evidence being lost, and (2) a large city such as Houston may have multiple DWI suspects waiting to be processed simultaneously, so that a delay in post-arrest procedures involving one suspect may have a "domino effect" on other cases.

The Petitioner contends, as it has since its first brief in the Court of Appeals, that *Edwards* may be satisfied by providing access to counsel in a reasonably convenient manner, including making communication with an attorney available via telephone. Since the application of a "bright line" *Edwards* rule and a concomitant exclusionary rule is a harsh remedy, the *Edwards* rule should not be read expansively. Again, *Edwards* was a judicial decision

on given facts, not a proclamation. Thus *Edwards* should be taken as meaning exactly what it says – interrogation should not proceed "until counsel has been made *available* to him" (emphasis added), which may be restated in this manner: Interrogation may proceed after counsel has been made available to the suspect. Whether a suspect takes advantage of that availability should not matter, for that is a choice beyond the control of the police. The police should not be penalized merely because a suspect turns down an offer which makes counsel "available," for the application of an exclusionary rule in that setting does not serve the purpose of deterring police misconduct. This question is ripe for consideration in this cause: the Respondent did not even try to secure advice from counsel through the means afforded by the police. Though claiming the telephone book would not help him, he did not even bother to look at it.

This Court has never addressed this precise question of what means of "availability" will satisfy this alternative under *Edwards*. As the Petitioner pointed out to the Court of Appeals, however, an intermediate appellate court in another state has held that the offer of a telephone and a directory of attorneys was a satisfactory means of making counsel available. *City of Seattle v. Carpenito*, 32 Wash.App. 809, 649 P.2d 861, 863 (1982) stated:

> We are persuaded that it is enough for the City to provide access to a telephone, access to the public defender's and several other available attorneys' phone numbers, and access to other means necessary to place an accused in communication with a lawyer.

A conflict between appellate courts of different states on a federal constitutional question is a good reason for this Court to grant review. While the Court of Appeals did not address *Carpenito*, it was asked to so twice. So was the Texas Court of Criminal Appeals. Neither Texas court even attempted an answer to *Carpenito*.

Moreover, the Petitioner submits that nothing in *Edwards* or *Miranda*, let alone the Fifth Amendment itself, guarantees a suspect the right to counsel of his choice. That choice should be accommodated as a matter of policy when possible, particularly in the context of more serious or more complex offenses, but other policy considerations such as delay may offset that accommodation. A balancing of interests in light of the nature of the case is appropriate. Most attorneys presumably are capable of rendering competent advice as to participation in custodial interrogation, particularly as to the limited, predictable interrogation characteristic of a DWI interview. Here a useful analogy may be drawn to *Ward v. State*, 733 P.2d 625 (Alaska App. 1987), which concerned a DWI suspect's right to an independent blood test. The Alaska appellate court held that this right did *not* mean a suspect was entitled to have a hospital of his choice draw the blood sample; Ward's right was sufficiently protected if he was given the chance to have a sample drawn at any hospital previously approved for this function. This Court should hold that the need for the police to process DWI interviews expeditiously outweighs any hypothetical advantage in consulting a particular attorney. Surely a "prophylactic rule," as opposed to a literal requirement of the Constitution itself, is susceptible to such a balancing of interests.

A third aspect of this issue is the question whether the Fifth Amendment right to counsel includes a right to utilize a non-lawyer intermediary to reach an attorney in lieu of the direct contact with an attorney made available by the police. Here the Respondent first was asked about calling "his" attorney, and the officer promptly directed the Respondent to the telephone and telephone directory. The Respondent then explained that he really did not know a particular attorney, much less have a standing relationship with one. He really wanted to call an unspecified "friend" who knew an attorney. Thus what the Respondent wanted to do depended on two contingencies before he could make contact with his friend's attorney: (1) he would be able to contact his friend, and (2) his friend actually could bring the Respondent into contact with a particular attorney. Unless both of those contingencies worked out in the Respondent's favor, he would be in no better position than if he simply accepted the offer of a telephone and directory from the officer.[11] While waiting for a chain of events to occur, minutes or even hours could elapse, delaying procedures in the Respondent's case as well as possibly delaying the interview of other suspects.

In the Petitioner's view, the right of access to counsel means exactly that, and this Court should not engraft a

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[11] The Respondent presented no evidence to show either of those conditions could be met. For that matter, the Respondent presented no evidence showing that his unspecified friend actually knew an attorney. The burden of proof obviously should have fallen on the Respondent on this matter, since it would be an impossible burden on the prosecution to prove the negative.

right to use intermediaries on that right.[12] It should be remembered that the *Miranda* right to counsel exists to bolster the *Miranda* right to remain silent during custodial interrogation, 386 U.S., at 469-470.[13] Thus it is ancillary to a right which in turn is only ancillary to the Fifth Amendment itself. *Michigan v. Tucker*, 417 U.S. 433, 444 (1974). A "right" to resort to a third party for advice or aid in obtaining counsel would be merely ancillary to the right to counsel, i.e. three steps removed from the Fifth Amendment itself. The Petitioner submits that the Fifth Amendment should not be exponentiated in that manner, regardless of the nature of the offense, but particularly not in the narrow context of DWI cases. This subcategory of cases presents a particular balancing of interests which favors expeditious, direct access to some attorney over finding a "constitutional right" to the use of intermediaries.

This Court should hold that neither the Fifth Amendment nor *Edwards v. Arizona* requires the police to go

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[12] This court held in *Fare v. Michael C.*, 442 U.S. 707 (1979) that a suspect had no Fifth Amendment right to contact a probation officer, but that case does not indicate that the suspect hoped the probation officer would recommend an attorney or assist in obtaining one.

[13] *Miranda* also suggested that the presence of counsel could serve a "subsidiary" function of providing an additional witness to help assure the trustworthiness of evidence concerning the interrogation. The opinion did not hold that this "subsidiary" function was of constitutional dimension. Moreover, how could counsel's presence serve that function better than a videotape of the interview?

farther than the officer did here in making counsel available, at least not in DWI cases.

CONCLUSION

For the aforesaid reasons, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX A

(Seal)

Opinion
In The
Court of Appeals
For The
First District of Texas

NO. 01-87-00805-CR

KENNETH JOSEPH SMITH, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Court at Law Number 8
Harris County, Texas
Trial Court Cause No. 955569

A jury found appellant guilty of driving while intoxicated, and the trial court assessed his punishment at 180 days in jail, probated for two years, and a fine of $400.

Appellant contends that the trial court committed reversible error by overruling his motion to suppress and allowing the jury to hear the audio portion of the videotape made after appellant requested legal counsel. This, he asserts, violated his fifth and sixth amendment rights.

At the beginning of the video appellant was given his *Miranda* warnings. After performing sobriety tests, appellant was asked whether he wished to contact an attorney. The exchange between appellant and the officer, in pertinent part, was as follows:

POLICE OFFICER: Now sir, at this time, I'd like to ask you a few questions. Keeping your legal warning in mind you do not have to answer these questions if you do not wish to do so. Would you like to answer a few questions for me sir?

APPELLANT: I can't say yes sir.

POLICE OFFICER: Yes sir, you can answer them if you'd like.

APPELLANT: I can answer you sir, but I can't say yes to all the questions without my lawyer, sir.

POLICE OFFICER: I see, would you like a lawyer? *Would you like to call your lawyer?*

APPELLANT: *Yes sir.*

POLICE OFFICER: Okay, there's a telephone there.

APPELLANT: I don't know my lawyer's number, sir. My friend knows my lawyer's number.

POLICE OFFICER: There's a phone book there also. You're only allowed to call your attorney. You're not allowed to call friends or relatives. You'll be able to do that if you're placed in the city jail. You'll be given that opportunity when you get over to the jail. Here you're only allowed to call your attorney.

APPELLANT: I'm sorry sir, I can't call my attorney cause I don't know his number.

POLICE OFFICER: Okay, there is a phone book there if you'd like to look it up.

APPELLANT: My friend knows his number sir, I don't have any problems, just my friend knows his number.

POLICE OFFICER: Do you know his name?

APPELLANT: No sir, my friend that I was driving with has a lawyer. I don't know his number.

POLICE OFFICER: Okay sir, if you'd like to look in the phone book for another lawyer, you have that right. Feel free to do so at this time.

APPELLANT: No sir, it wouldn't do me any good. I don't know my lawyer's number.

POLICE OFFICER: All right sir, do you realize – are you willing to answer any questions for me?

APPELLANT: Yes sir.

POLICE OFFICER: Keeping your legal warning in mind, you do not have to answer them if you do not wish to do sir.

APPELLANT: I won't answer the ones I don't feel like.

Thereafter, a number of incriminating questions were asked, such as "have you been drinking," and "are you under the influence of alcohol now?" Appellant responded in the negative, but refused to take a breath test. The officer informed him that his license would be automatically suspended for 90 days, and the following exchange occurred:

APPELLANT: Does this mean I cannot contact an eff cient lawyer?

POLICE OFFICER: No sir, you can still have the opportunity to call a lawyer if you like at this time.

APPELLANT: I just don't have his number on me sir.

POLICE OFFICER: Sir, if you want to when you get over to the jail, you'll be given the opportunity to contact anyone you want, however many phone calls you need to make. You understand?

APPELLANT: That's all I need.

POLICE OFFICER: Okay, are you willing to take the breath test? Yes or no?

APPELLANT: Without my lawyer present? No sir.

POLICE OFFICER: At this time, I need you to sign your name indicating that you have refused to take the breath test.

APPELLANT: Does it say without my lawyer present, sir?

POLICE OFFICER: Excuse me?

APPELLANT: Does it say without my lawyer present?

POLICE OFFICER: No sir, you still have to sign.

APPELLANT: Then it doesn't matter, does it.

POLICE OFFICER: Do you wish to sign it sir, I just have to have it –

APPELLANT: Not without my lawyer present. I can't give up any rights.

In denying appellant's motion to suppress the audio portion of the video tape, the trial court concluded that appellant invoked his right to counsel, but knowingly waived it when he said, "I am going to go ahead and talk to you anyway." (The trial judge was paraphrasing what he believed he saw in the video.) The video tape was then played for the jury.

In *Miranda v. Arizona*, 384 U.S. 436 (1966), the United States Supreme Court held that once a defendant requests a lawyer, all interrogation must cease. *Id.* at 473-74. In *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981), the Supreme Court stated:

> we now hold that when an accused had invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he had been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

The State argues that *Edwards* was satisfied because appellant had an opportunity to contact legal counsel, and because appellant did not express a desire to deal with the police "only through counsel." The State emphasizes appellant's response – "I can't say yes to all the questions without my lawyer, sir" – and claims that appellant had a partial or selective willingness to answer questions. The State relies on *Connecticut v. Barrett*, 107 S.Ct. 828 (1986). In *Barrett*, the accused refused to give a written statement without his attorney, but agreed to give an oral statement without his lawyer being present. *Id.* at 830. The court held that the accused's limited request for counsel "accompanied by affirmative announcement of

his willingness to speak with the authorities" was a voluntary waiver of his rights, and his subsequent oral statements were admissible. *Id.* at 832.

Justice Brennan's concurring opinion in *Connecticut v. Barrett* stressed that partial invocation of the right to counsel "without more, invariably will be ambiguous." *Id.* at 835 (Brennan, J., concurring). Brennan further stated:

> It gives rise to doubts about the defendant's precise wishes regarding representation and about his or her understanding of the nature and scope of the right to counsel. Thus, the police may not infer from a partial invocation of the rights to counsel *alone* that the defendant has waived any of his or her rights not specifically invoked. However, circumstances may clarify an otherwise ambiguous situation. If the a (sic) partial invocation is accompanied by an explicit waiver of the right to silence that is voluntary, knowing, and intelligent, it may lose its ambiguity.

Id. (Brennan, J., concurring).

If appellant's initial statement was only a partial invocation of the right to counsel, it was followed by a specific question inquiring whether appellant wanted an attorney. Appellant unequivocally replied, "Yes sir."

Once appellant invoked his right to counsel, all interrogation should have ceased. Appellant never stated that he did not want counsel and never initiated further conversations with the police.

The burden was on the State to show that appellant specifically and affirmatively waived his right to counsel, or that appellant initiated further discussions with the

police. *Edwards v. Arizona*, 451 U.S. at 485, 486 n.6. The videotape in the instant case clearly establishes that appellant did not initiate further conversation with the officer. It establishes that the officer initiated the communication that followed.

We find that the trial court erred in admitting the audio portion of the videotape into evidence. *Compare Ochoa v. State*, 573 S.W.2d 796 (Tex. Crim. App. 1978).

Having found error, we must now determine whether the error was harmless. Tex. R. App. P. 81 (b) (2) provides that we "shall reverse the judgment under review, unless the appellate court determines beyond a reasonable doubt that the error made no contribution to the conviction or to the punishment."

The only disputed fact was whether appellant was intoxicated. Appellant refused to take a breath test. Officer Blaine testified that appellant was intoxicated, that he smelled of alcohol, and that appellant performed poorly on field sobriety tests. Blaine stated that, although he did not take any notes about the incident, he could recall that appellant stumbled on the head tilt test and missed his nose three times on the coordination test. Blaine further testified that he turned appellant's vehicle over to a lone woman passenger. Appellant and the passenger to whom the officer released the vehicle testified that the vehicle contained four people, three passengers beside appellant.

Appellant performed all the physical tests shown on videotape and was not obviously intoxicated. In the videotape, appellant stated that he had had nothing to drink, but had taken medication bearing a label that it should not be taken along with alcoholic beverages. However,

when he testified at trial, appellant admitted that he had had "two, maybe three" drinks several hours before his arrest.

The videotape directly conflicted with appellant's testimony in court and showed him refusing to furnish evidence and invoking constitutional rights. All of this probably weakened his case before the jury. *Compare Jones v. State*, No. 11-85-110-CR (Tex. App. – Eastland, Feb. 4, 1988, no pet.) (not yet reported); *Knox v. State*, 722 S.W.2d 793, 795 (Tex. App. – Amarillo 1987, no pet.).

The sole point of error is sustained.

The judgment is reversed, and the cause is remanded to the trial court.

/s/ Murry B. Cohen
Murry B. Cohen
Justice

Justices Bissett and Smith also sitting.
Publish. Tex. R. App. P. 90.

Judgment rendered and opinion delivered: June 9, 1988
True copy attest:

/s/ Kathryn Cox
Kathryn Cox
Clerk of the Court

APPENDIX B

Order
In The
Court of Appeals
For The
First District of Texas

NO. 01-87-00805-CR

KENNETH JOSEPH SMITH, APPELLANT

V.

STATE OF TEXAS, APPELLEE

ON MOTION FOR REHEARING EN BANC

On this day came on to be considered State's motion for rehearing en banc. And such motion is hereby **OVERRULED**.

It is so ORDERED.

PER CURIAM

En Banc
Order entered July 28, 1988

True copy attest:
KATHRYN COX
CLERK OF THE COURT

/s/ BY: Margie Thompson
MARGIE THOMPSON
CHIEF DEPUTY

(SEAL) OFFICIAL NOTICE

COURT OF CRIMINAL APPEALS

May 10, 1989
COA#: 01-87-00805-CR

RE: Case No. 1031-88
STYLE: Smith, Kenneth

On this day, the State's Petition for Discretionary Review has been REFUSED.

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

(SEAL) OFFICIAL NOTICE

COURT OF CRIMINAL APPEALS

June 28, 1989
COA#: 01-87-00805-CR

RE: Case No. 1031-88
STYLE: Smith, Kenneth

On this day the State's Motion for Rehearing was denied.

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

APPENDIX C

[PARTIAL TRANSCRIPTION OF STATE'S EXHIBIT # 1]

Police Officer: "Now sir, at this time, I'd like to ask you a few questions. Keeping your legal warning in mind, you do not have to answer these questions if you do not wish to do so. Would you like to answer a few questions for me sir?"

Kenneth Smith: "I can't say yes to it."

Police Officer: "Yes sir, you can answer them if you'd like."

Kenneth Smith: "I can answer you sir, but I can't say yes to all the questions without my lawyer, sir."

Police Officer: "I see, would you like a lawyer? Would you like to call your lawyer?"

Kenneth Smith: "Yes sir."

Police Officer: "Okay, there's a telephone there."

Kenneth Smith: "I don't know my lawyer's number, sir. My friend knows my lawyer's number."

Police Officer: "There's a phone book there also. You're only allowed to call your attorney. You're not allowed to call your friends or relatives. You'll be able to do that if you're placed in the city jail. You'll be given that opportunity when you get over to the jail. Here you're only allowed to call your attorney."

Kenneth Smith: "I'm sorry sir, I can't call my attorney cause I don't know his number."

Police Officer: "Okay, there is a phone book there if you'd like to look it up."

Kenneth Smith: "My friend knows his number sir, I don't have any problems, just my friend knows his number."

Police Officer: "Do you know his name?"

Kenneth Smith: "No sir, my friend that I was driving with has a lawyer. I don't know his number."

Police Officer: "Okay sir, if you'd like to look in the phone book for another lawyer, you have that right. Feel free to do so at this time."

Kenneth Smith: "No sir, it wouldn't do me any good. I don't know my lawyer's number."

Police Officer: "All right sir, do you realize – are you willing to answer any questions for me?"

Kenneth Smith: "Yes sir."

Police Officer: "Keeping your legal warning in mind, you do not have to answer them if you do not wish to do sir."

Kenneth Smith: "I won't answer the ones I don't feel like."

Police Officer: "All right sir, were you operating a motor vehicle?"

Kenneth Smith: "Yes sir, I was."

Police Officer: "What kind of vehicle were you operating?"

Kenneth Smith: "A Toyota, sir."

Police Officer: "What roadway were you on?"

Kenneth Smith: "59, sir."

Police Officer: "Were you north, south, east, or west bound?"

Kenneth Smith: "South, sir."

Police Officer: "Okay, have you been drinking?"

Kenneth Smith: "No sir."

Police Officer: "And what were you drinking?"

Kenneth Smith: "No sir."

Police Officer: "Are you under the influence of alcohol now?"

Kenneth Smith: "No sir."

Police Officer: "Are you under the influence of anything other than alcohol such as prescribed medication, over the counter drug, or any medicine for that matter?"

Kenneth Smith: "No sir."

Police Officer: "Were you involved in an accident?"

Kenneth Smith: "No sir."

Police Officer: "All right Mr. Smith, on a scale of zero to ten, with zero being sober and ten being intoxicated, how would you rate yourself? Do you understand the question Mr. Smith?"

Kenneth Smith: "Is that a question I have to answer sir?"

Police Officer: "No sir, you don't have to answer it if you don't want to."

Kenneth Smith: "Yes sir."

Police Officer: "Do you understand it."

Kenneth Smith: "Yes sir, I understand the question."

Police Officer: "You just don't want to answer it?"

Kenneth Smith: "I didn't say that sir."

Police Officer: "On a scale of zero to ten, with zero being sober and ten being intoxicated, how would you rate yourself?"

Kenneth Smith: "Zero sir, me, zero sir."

Police Officer: "All right Mr. Smith, you're on video tape, would you like to make a statement concerning your arrest and why you think you're not intoxicated?"

Kenneth Smith: "Yes sir, because I took some medication for my tooth sir."

Police Officer: "Okay, you have been taking medication?"

Kenneth Smith: "Yes sir, I have a tooth ."

Police Officer: "What kind of medication were you taking?"

Kenneth Smith: "Something FORTE, is the name of the medication. I'll be honest, that's all I was taking."

Police Officer: "How long ago had you taken it; when was the last time you had taken it?"

Kenneth Smith: "I take it at six and midnight, sir, just like I'm supposed to."

Police Officer: "Okay is that in tablet form or liquid form, or do you have an injection?"

Kenneth Smith: "Tablet form."

Police Officer: "Okay sir, is it a prescribed medication?"

Kenneth Smith: "Yes sir."

Police Officer: "Okay is there any warning labels on the bottle, or any doctor's or physician's warnings in regards to taking

the medication and drinking? Are you allowed to do that?"

Kenneth Smith: "No sir."

Police Officer: "Is there a warning label on the bottle?"

Kenneth Smith: "Yes sir."

Police Officer: "Does it state to avoid drinking alcohol and taking the medication?"

Kenneth Smith: "Yes sir."

Police Officer: "All right Mr. Smith, at this time I'm going to read your D.W.I. statutory warning. I'm going to give you a copy for your own personal records. If you wish, follow along silently and I'll read aloud for you, if you have any questions in regards to it I'll be happy to answer them at the end. You're under arrest for the offense of driving while intoxicated. I request that you submit to the taking of a specimen of your breath for the purpose of analysis to determine the concentration of alcohol in your body. If you refuse to give that specimen, that refusal can be used against you in subsequent prosecution. Your driver's license permit or privilege to operate a motor vehicle will be automatically suspended for 90 days after notice and hearing has been requested, whether or not you are subsequently prosecuted as a result of this arrest. If you so not possess a license or permit to operate a motor vehicle, you may not be issued a license or permit to operate a motor vehicle for a period of 90 days after notice and a hearing has been requested. Further,

you have the right within 20 days after receiving written notice of the suspension or denial of the license or permit to request in writing a hearing on the suspension or the denial. I certify that I have orally informed you of the consequences of the refusal and have provided you with a complete and true copy of your statutory warning. Time now is 3:16 A.M. Okay Mr. Smith, so you understand the D.W.I. Statutory Warning?"

Kenneth Smith: "Yes sir."

Police Officer: "Sir if you'll allow me the opportunity I'll explain a little more in my own terms. What this is asking you to do is take a breath test. The options are, if you take the breath test and fail the breath test, you will be placed in the city jail tonight and be filed on for D.W.I., however you will not loose your license until you have a hearing. If you take the test and you pass the test, and the officer's have no further charges pending against you, you will be free to go. If you refuse to take the breath test, you will be placed in the city jail tonight and be filed on for D.W.I. and you automatically loose your license for 90 days. Do you understand your options Mr. Smith?"

Kenneth Smith: "Yes sir."

Police Officer: "Okay sir, at this time are you willing to take the breath test, yes or no?"

Kenneth Smith: "No sir."

Police Officer: "I have requested that you give a specimen of your breath. I have informed

you of the consequences of not giving a specimen. You have refused to give a specimen. I request that you sign this statement indicating your refusal. Sir, once again, you understand that if you refuse, your license will automatically be suspended for 90 days and you will be placed in the city jail tonight and filed on for D.W.I. Do you understand?"

Kenneth Smith: "Does this mean I cannot contact efficient [sic]lawyer?"

Police Officer: "No sir, you still have the opportunity to call a lawyer if you like at this time."

Kenneth Smith: "I just don't have his number on me sir."

Police Officer: "Sir, if you want to when you get over to the jail, you'll be given the opportunity to contact anyone you want, however many phone calls you need to make. You understand?"

Kenneth Smith: "That's all I need."

Police Officer: "Okay, are you willing to take the breath test? Yes or no?"

Kenneth Smith: "Without my lawyer present? No sir."

Police Officer: "At this time, I need you to sign your name indicating that you have refused to take the breath test."

Kenneth Smith: "Does it say without my lawyer present, sir?"

Police Officer: "Excuse me?"

Kenneth Smith: "Does it say without my lawyer present?"

Police Officer: "No sir, you still have to sign."

Kenneth Smith: "Then it doesn't matter, does it."

Police Officer: "Do you wish to sign it sir, I just have to have it –."

Kenneth Smith: "Not without my lawyer present. I can't give up any rights."
